(4)

No. 04-1374

# In The Supreme Court of the United States

CITY OF HEMET, DAVE QUINN, AARON MEDINA, DANIEL REINBOLT, NATE MILLER, PETER HEWITT, LEE EVANSON and HEMET POLICE DEPARTMENT,

*Petitioners,*

v.

THOMAS SMITH,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI


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## I.

## THE EN BANC OPINION DIRECTLY CONFLICTS WITH *HECK v. HUMPHREY*, 512 U.S. 477 (1994) BY ALLOWING A CRIMINAL DEFENDANT TO REPUDIATE THE FACTUAL BASIS AND THUS NECESSARILY IMPLY THE INVALIDITY OF A CONVICTION BASED UPON AN UNCONDITIONAL GUILTY PLEA.

This case presents an important issue concerning application of this Court's decision in *Heck v. Humphrey* to the most common disposition of criminal charges – a plea bargain. The Ninth Circuit's en banc decision has improperly strait jacketed application of *Heck* to convictions based on guilty pleas by requiring defendants to somehow establish the factual basis of the plea when the criminal defendant has entered a general guilty plea and deliberately foreclosed presentation of evidence in the underlying criminal proceeding.

Respondent's opposition to the petition contains only a single paragraph addressing the guilty plea issue (Opposition p. 8), and even then does not specifically address the arguments raised in the petition. Instead, respondent simply echoes the Ninth Circuit's analysis, asserting that since Smith engaged in multiple acts which constituted a violation of California Penal Code section 148, everything from disobeying an officer's verbal commands, to physically resisting the officer's application of force, the precise factual basis of his conviction cannot be determined and, hence, the civil rights action does not "necessarily" imply the invalidity of or implicate the criminal conviction. (Opposition p. 8.) But neither the Ninth Circuit nor

respondent are free to ignore the effect of a guilty plea under California law.

By pleading guilty, Smith relieved the prosecution of having to make a record, let alone prove the specific charges or introduce any factual basis for the charge. (Petition p. 10.) And significantly, where, as here, there are multiple acts which might form the basis of criminal charges, the guilty plea forecloses future prosecution on any of the acts under the Double Jeopardy Clause. (*Id.* pp. 11-12.) Thus, respondent's assertion that the guilty plea concerns only facts "which *might* have been introduced at a criminal trial and which *might* have formed the basis for a criminal conviction" (Opposition p. 8) is a flat misstatement of the effect of a guilty plea. As noted, it is an admission of the factual basis of the charges, including all of the facts on which the charges may be based and, hence, for that reason forecloses future prosecution on any factual basis for the charges.

This repudiation of a guilty plea is inconsistent with *Heck* in two fundamental ways. First, it is inconsistent with common law claims for malicious prosecution to which the Court analogized in *Heck*. A malicious prosecution claim cannot be brought where there has been a guilty plea, because the plea does not constitute a "favorable termination" of the underlying action. (Petition pp. 11-12.) Respondent does not even attempt to address this issue.

Second, allowing Smith to effectively repudiate his general guilty plea by now contending that he did not plead guilty to physically resisting the officers – thus admitting their lawful use of force – undermines the integrity of the criminal proceedings and direct review of that conviction through the state criminal appellate

process or federal habeas corpus. By pleading guilty, Smith shielded himself from further prosecution for any of the acts which constituted resisting arrest by having jeopardy attach, and at the same time deliberately elected to waive the right to attack the factual basis of his conviction. (Petition p. 10.) Allowing a civil suit under these circumstances does more than simply "imply" the invalidity of the underlying conviction. It is difficult to imagine conduct that more undermines the integrity of a criminal conviction and the processes for direct review of such a conviction, than by allowing a defendant to manipulate the system by taking advantage of a plea bargain to limit exposure to a more severe sentence or further prosecution, but then repudiate the broad scope of the plea when it is convenient to do so in a civil rights action. This is the very sort of gamesmanship that *Heck* sought to foreclose.

The Ninth Circuit's decision is flatly inconsistent with *Heck*, and erodes application of *Heck* to the most common basis for conviction – a guilty plea. It is therefore essential that this Court grant certiorari.

## II.

## THE EN BANC DECISION EXPRESSLY INCORPORATES A "LESS INTRUSIVE ALTERNATIVES" STANDARD INTO EVALUATION OF USE OF FORCE UNDER THE FOURTH AMENDMENT, IN DIRECT CONFLICT WITH THIS COURT'S DECISION IN *GRAHAM v. CONNOR*, 490 U.S. 386 (1989), THIS COURT'S REJECTION OF THAT PRINCIPLE IN OTHER FOURTH AMENDMENT CASES, AND THE DECISIONS OF OTHER CIRCUITS.

Respondent asserts the Ninth Circuit did not alter the objective reasonableness test set forth by this Court in

*Graham v. Connor*, 490 U.S. 386, by holding that in evaluating reasonable use of force by police officers a jury could consider the availability of less intrusive alternatives. Echoing the en banc decision, Smith argues that the availability of lesser intrusive alternatives is part of the "totality of the circumstances" test to determine whether the force was reasonable. According to Smith, "[w]hile not determinative, a seizure's intrusiveness and *whether it could be avoided* consistent with law enforcement interests, are obviously relevant to the totality of circumstances." (Opposition p. 11, emphasis added.)

However, *Graham* itself says nothing about consideration of less intrusive alternatives as part of, or in addition to, the three factor test. More critically, as noted in the petition, this Court has expressly held in the context of other Fourth Amendment cases, that whether a particular search or seizure "could be avoided" by employing less intrusive means was irrelevant in evaluating the reasonableness of a particular search or seizure. (Petition pp. 17-18.) Respondent does not address this Court's clear holding in those cases. Nor do any of the cases Smith cites (Opposition pp. 11-12) purport to discuss, let alone adopt a "less intrusive means" analysis in evaluating the reasonableness of a particular search or seizure under the Fourth Amendment.[1]

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[1] For example, the passage cited from *Illinois v. MacArthur*, 531 U.S. 326 (2001) simply distinguishes that case from an earlier decision involving vastly different facts where the Court had held a warrantless entry into a home to be illegal. In *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), this Court did not *uphold* "a search by a dog walking around a car because it was 'much less intrusive than a typical search'" (Opposition pp. 11-12). This Court held there was no "search" at all. *See* 531 U.S. at 40 [Use of such dogs "does not transform the seizure

(Continued on following page)

Respondent also ignores the direct conflict between the Ninth Circuit's en banc decision and the decisions of the Seventh, Eighth, Tenth and Eleventh Circuits which have expressly held that the availability of less intrusive alternatives was not relevant to the reasonableness inquiry under *Graham*. (Petition pp. 20-21.) Moreover, the Eighth and Tenth Circuits have expressly held that the very sort of expert testimony on less intrusive alternatives that the Ninth Circuit finds pertinent here is irrelevant because there is no less intrusive alternative test under the Fourth Amendment. (Petition p. 22.)

The en banc decision's express adoption of a less intrusive alternative test as a component in evaluating the reasonableness of an officer's use of force under the Fourth Amendment will necessarily spawn confusing and incorrect jury instructions, and protracted proceedings involving elaborate expert testimony purporting to establish what officers "should" have done to avoid use of a particular level of force under the circumstances. This is contrary to *Graham* and to the other decisions of this Court interpreting the Fourth Amendment and contrary to the decisions of the other Circuits. It is essential that this Court grant review.

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into a search"]. The Court then found the *seizure* to be unconstitutional because the checkpoints were not directed to any particular criminal threat. In *Bond v. United States*, 529 U.S. 334 (2000), the Court did not find the seizure unreasonable because there were less intrusive means available to accomplish the goal. Rather, the case turned on the bus passenger's reasonable expectation of privacy with respect to physical inspection of a carry-on bag. 529 U.S. at 338-39. Nor do *Schmerber v. California*, 384 U.S. 757 (1966), *Winston v. Lee*, 470 U.S. 753 (1985) and *United States v. Place*, 462 U.S. 696 (1983) hold that the necessity for a particular manner of search or seizure is measured by the availability of less intrusive alternatives.

## III.

## CERTIORARI IS WARRANTED TO CLARIFY APPLICATION OF *TENNESSEE v. GARNER*, 471 U.S. 1 (1985) AND RESOLVE A CONFLICT AMONG THE APPELLATE COURTS CONCERNING THE DEFINITION OF DEADLY FORCE AND WHETHER USE OF A PROPERLY TRAINED POLICE DOG MAY CONSTITUTE DEADLY FORCE.

Respondent argues that the en banc decision does not warrant review, because it simply brings the Ninth Circuit "in line with other Circuits and law enforcement on the definition of deadly force," purportedly by adopting the Model Penal Code definition of deadly force. (Opposition p. 13.) That definition, in turn, defines deadly force as force which "creates a substantial risk of causing death or serious bodily injury." (App. 29, citing Model Penal Code § 3.11(2) (1962)). This definition necessarily encompasses even nonlethal force to the extent that the force would otherwise cause "serious bodily injury."

Respondent's desire to invoke that standard in this case is understandable given, as noted in the petition, the widely held view of the circuit courts that this Court's decision in *Tennessee v. Garner* creates a separate standard for evaluating "deadly force" under the Fourth Amendment and sharply limits application of such force even without consideration of the other *Graham* factors. (Petition pp. 23-24.) Respondent and, indeed, other plaintiffs will exploit the absence of any precise definition of "serious bodily injury" in an attempt to classify broad categories of force as "deadly force" for purposes of invoking *Garner*. For example, the Model Penal Code itself amorphously defines "serious bodily injury" to include "bodily injury which creates a substantial risk of death or

which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ." Model Penal Code § 210.0(3). And, as amici curiae point out, other statutory and regulatory definitions of the term are equally expansive, including force that leads to a "serious impairment of physical condition," including, but not limited to, loss of consciousness, bone fracture "impairment of function of any bodily member or organ; a wound requiring extensive suturing" or "requiring medical intervention such as surgery, hospitalization, or physical rehabilitation." (Brief of Amici Curiae League of California Cities, California State Association of Counties and International Municipal Lawyers Association in Support of Petitioners, p. 16, citing California Penal Code § 243(f)(4) and Sentencing Guidelines for the United States Courts, 18 U.S.C.'s Appendix, § 1B1.1, Application Note 1.(L).) Virtually every application of force by a police officer which results in injury will therefore be subject to a debate as to whether it is "deadly force" under *Garner*.

To the extent *Garner* creates a special standard on use of deadly force, this Court clearly focused on deadly force in its literal sense – force which is likely to cause death. (Petition pp. 24-25.) Moreover, none of the Circuits which have purported to adopt the Model Penal Code definition of deadly force considered the question of whether nonlethal force capable of causing only serious bodily injury constituted deadly force under *Garner*. All of the cited cases involved application of force that was quintessentially capable of causing death or actually cause death, everything from discharging a firearm to dropping a bomb on a building. (*See* Petition p. 27.) And, while respondent trumpets the fact that the City of Hemet and many police

agencies define deadly force as force that is substantially likely to cause death or a serious injury, those standards simply recognize that by its nature lethal force is necessarily capable of causing serious bodily injury even if its application does not lead to death in a particular instance. Quite simply, lethal force is virtually always capable of causing serious bodily injury. However, the converse is not true, i.e., force capable of causing serious bodily injury is not necessarily substantially likely to cause death. This is why various types of force are not categorized as deadly force by police agencies notwithstanding deadly force being defined as force capable of causing death or serious injury. As the en banc opinion acknowledged here, in fact, the City of Hemet use of force policy did not classify use of a police service dog as deadly force, but rather as "intermediate force." (App. 20.) Conspicuously absent from the litany of professional police standards respondent cites as adopting the Model Penal Code definition of deadly force is any standard which defines deadly force as including use of a canine or any other force that is nonlethal.

The Ninth Circuit's holding that application of nonlethal force, more particularly, use of a canine, that might cause serious bodily injury may constitute use of deadly force under *Garner* is in direct conflict with the Eighth Circuit's decision in *Kuha v. City of Minnetonka*, 365 F.3d 590, 598 n.3 (8th Cir. 2004). Smith attempts to sidestep this express conflict by arguing that the Eighth Circuit's holding in *Kuha* is dicta because it also rejected liability under the Model Penal Code definition of deadly force, and that it is contrary to the Eighth Circuit's en banc decision in *Mattis v. Schnarr*, 547 F.2d 1007, 1009 n.2 (8th Cir. 1976), *vacated as moot sub nom., Ashcroft v. Mattis*, 431 U.S. 171 (1977). Neither ground withstands

scrutiny. The *Kuha* court expressly declined to apply the Model Penal Code definition and instead adopted the Ninth Circuit's prior decision in *Vera Cruz v. City of Escondido*, 139 F.3d 659 (9th Cir. 1998). *See* 365 F.3d at 598 n.3. This is not dicta. Nor was the *Kuha* court bound by the Eighth Circuit's prior en banc decision in *Mattis*. First, the decision in *Mattis* was vacated as moot following this Court's grant of certiorari. Second, *Mattis* is a pre-*Garner* case and therefore the Court did not have occasion to interpret the meaning of deadly force in the context of *Garner's* Fourth Amendment analysis. Third, *Mattis* involved application of quintessentially deadly force – discharge of a firearm by a police officer – and does not purport to hold that nonlethal force that may cause serious bodily injury necessarily constitutes deadly force under the Fourth Amendment.

The Ninth Circuit's decision also conflicts with the decision of other federal appellate courts concerning whether use of a trained canine to bite and hold a suspect constitutes deadly force under *Garner*. Respondents argue that the Ninth Circuit left the issue open, remanding to the district court for presentation of evidence as to whether use of a canine is capable of causing serious bodily injury and, hence, constitutes deadly force. (Opposition pp. 15-16.) But, there is no justification for such a remand. Applying this Court's decision in *Garner*, and recognizing its limited application solely to lethal force, the First, Eighth and Sixth Circuits have expressly held that use of a canine to bite and hold a suspect does not constitute deadly force under *Garner*. (Petition p. 29.) It is only the Ninth Circuit's distorted application of this Court's decision in *Garner* that leaves the issue "open" at all.

The Ninth Circuit's holding that nonlethal force that is capable of causing serious bodily injury may constitute deadly force under *Garner* creates confusion not simply with respect to application of a canine to restrain suspects, but also application of a wide variety of nonlethal force by police officers. The result will be endless litigation on the question of whether a particular use of force may cause "serious bodily injury", and hence allow the plaintiff to shortcut the *Graham* factors by invoking *Garner*. This protracted litigation will have a direct adverse impact on the courts, and also on the day-to-day ability of police officers to evaluate their use of force in light of what had been clear constitutional standards. The Ninth Circuit's decision is contrary to the decisions of this Court in *Garner* and *Graham*, as well as the decisions of other federal circuit courts. It is necessary for this Court to grant review.

Respectfully submitted,

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